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No. 286

In the Supreme Court of the United States

OCTOBER TERM, 1960

TOM DON FRANANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statement	2
Argument	6
Conclusion	11

CITATIONS

Cases:

Graves v. *United States*, 191 F. 2d 579	11
Johnson v. *United States*, 195 F. 2d 673	8
United States v. *Drexel*, 56 F. 2d 588	8
United States v. *Johnson*, 319 U.S. 503	10
United States v. *Schenck*, 126 F. 2d 702, certiorari denied *sub nom. Moskowitz* v. *United States*, 316 U.S. 705	10

Statute:

18 U.S.C. 2312	2

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OPINION BELOW

The opinion of the court of appeals (Vol. IV, 1–11; Pet. App. 2–12) is reported at 277 F. 2d 511.[1]

[1] The record consists of six volumes. Volumes I and II, which are consecutively paginated, constitute the reporter's transcript of the trial, and will be referred to as "Tr." Volume III is a supplemental transcript, which is separately paginated, and will be referred to as "Vol. III." Volume IV and V constitute, respectively, the proceedings in the court of appeals and the pleadings and papers filed in the district court, and will be referred to as "Vol. IV" and "Vol. V," respectively. Volume VI contains selected government exhibits introduced into evidence at the trial, and will be referred to as "G. Ex.", together with the appropriate exhibit number.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1960 (Vol. IV, 12). A petition for rehearing was denied on June 3, 1960 (Vol. IV, 16). Mr. Justice Whittaker extended the time for filing a petition for a writ of certiorari to August 2, 1960, and the petition was filed on August 1, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that there were no fatal variances as between the allegations in three counts and the proof at the trial.

2. Whether it was proper to charge petitioner with conspiracy to violate the "Dyer Act" and with substantive violations of that Act.

3. Whether the trial court properly allowed the jury to consider summaries of the Government's evidence relating to individual stolen cars.

STATEMENT

A seven-count indictment returned in the United States District Court for the Western District of Missouri charged petitioner and three others (Count I) with conspiring to transport in interstate commerce motor vehicles known to have been stolen, in violation of the "Dyer Act", 18 U.S.C. 2312 (Vol. V, 4–6; Pet. App. 13–15). Counts II through VII were substantive counts and charged petitioner and Frank Triola with the interstate transportation of certain stolen 1957 Chevrolets. Following a trial by jury, petitioner and Frank Triola were found guilty on all counts as charged, and Defendant Jo Ann King was found guilty

on Count I as charged (Vol. III, 4–5; Vol. V, 90–92).[2] Petitioner was sentenced to serve a term of imprisonment of four years on each of Counts I, II and III, the sentences to run concurrently with each other (Group I), and to serve a term of imprisonment of four years on each of Counts IV, V, VI and VII (Group II), the sentences on these counts to run concurrently with each other, but consecutive to the sentences imposed on the counts in Group I (a total of eight years' imprisonment) (Vol. V, 104). On appeal, the court of appeals unanimously affirmed petitioner's conviction. 277 F. 2d 511.[3]

The pattern of the evidence on the substantive counts is illustrated by that relating to Counts III and IV (which, taken alone, will support the sentence imposed).

Count III: Some time after July 24, 1957, a 1957 Chevrolet was stolen from a storage lot in Kansas City, Missouri (Tr. 217–218). On August 2, 1957, "Don W. Renald" of Moulton, Alabama, obtained an Alabama registration for a 1957 Chevrolet which was described by the same serial number as that missing from a 1957 Chevrolet in Memphis, Tennessee (Tr. 220–221, 224, 226–227; G. Ex. 50).[4] The

[2] The trial judge granted defendant Sam Triola's motion for judgment of acquittal (Tr. 404–405, 407–408).

[3] Petitioner is the only defendant who appealed his conviction.

[4] Mr. Timothy Adams, a superintendent at a Chevrolet plant in Missouri, testified concerning the serial number identification procedure on the Chevrolet automobiles (Tr. 95–109). Each vehicle produced is assigned a different serial number, which is preceded by certain prefixes. The figure "57" indicates the year that the car is produced; the letter following the

public serial number plate from the Memphis car was substituted for the public serial number on the stolen Chevrolet (Tr. 251–253). Shortly thereafter, petitioner brought certain automobile papers of "Don W. Renolds" for notarization before a notary public in Clay County, Missouri (Tr. 347–350, 352). On August 6, 1957, "Don W. Renaldo" applied for an Illinois title and registration, on surrender of the Alabama registration (Tr. 239–242; G. Ex. 50). As representatives of "T & F Motors", petitioner and Frank Triola subsequently sold the stolen Chevrolet to a used car dealer in Denver, Colorado (Tr. 164–167, 251–252; G. Ex. 28).

Count IV: On August 2, 1957, "George Rogers" of Route 1, Tuscumbia, Alabama, obtained an Alabama registration for a 1957 Chevrolet described with the same public serial number as that which was missing from a 1957 Chevrolet in Springfield, Missouri (Tr. 254–255, 260–261; G. Ex. 52). This public serial number was substituted for the public

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year designation indicates the assembly plant; and the last six digits indicates the actual number of the vehicle in question. This number is stamped at two points on the frame of the vehicle (Tr. 99). The number appearing on the frame is known as the "confidential" or "hidden" serial number. In addition, the same serial number, together with further prefixes indicating the body style and motor type of the particular car, is stamped on a metal plate which is spot welded to the door post of the car (Tr. 98, 103–104). This number is referred to as the "public" serial number. The "confidential" serial number and the "public" serial number are identical in all respects except that the "public" serial number contains the added prefixes denoting the body style and motor type of the particular car (Tr. 102, 105–106).

serial number on a 1957 Chevrolet which was subsequently stolen in Kansas City, Missouri (Tr. 279–283, 332–333). On August 14, 1957, petitioner, using the name "George Rogers",[5] applied for a South Dakota title to the automobile described in the Alabama registration (Tr. 268–270, 273, 275, 277).[6] A few days later, petitioner and Frank Triola, as representatives of "D & G Motors," sold the stolen Chevrolet to a used car dealer in Denver, Colorado (Tr. 168–172). The used car dealer made his check payable to "V & G Motors." Petitioner endorsed this check with the name "Vic De Grego" (Tr. 171–174).[7] The scheme of the defendants is summarized by the opinion below as follows (Pet. 8a): "They would first remove or steal from a 1957 Chevrolet the identification plate which was spot-welded to the left front door post. They would then go to the State of Alabama or some other state wherein the law permits registration of vehicles without issuance of an

[5] Petitioner also had certain automobile papers for "George Rogers" and "Fred L. Potitte" notarized before a notary public in Clay County, Missouri (Tr. 347–358). Using the name "Fred L. Potitte," Frank Triola, on August 14, 1957, applied for a South Dakota title and registration to an automobile, on surrender of an Alabama registration to that automobile issued to "Fred L. Potitte" of Moulton, Alabama (Tr. 264–265, 270; G. Ex. 54). An FBI agent testified that there was no "Fred L. Potitte" of Moulton, Alabama (Tr. 341).

[6] Although a South Dakota registration was issued on August 14, 1957, apparently no South Dakota title was issued for this Chevrolet. The car was subsequently titled in Montana (Tr. 259–261; G. Ex. 52).

[7] Petitioner and Jo Ann King used the name "De Grego" in registering in various hotels and motels in 1957, and on one occasion, in obtaining a South Dakota driving permit (Tr. 36, 38–39, 342–344, 392–396; G. Exs. 69, 70, 72).

actual title. A vehicle registration would thus be fraudulently obtained in that state for a vehicle bearing the identifying description shown on the stolen serial plate. The registration papers obtained in Alabama would then be taken to another state, and a genuine title obtained by surrender of the Alabama registration. A new 1957 Chevrolet, identical in body style and general description to the vehicle described on the title papers would then be stolen. The stolen identification plate would be substituted and the vehicle would then be taken to another state and sold by using the title papers which were obtained as outlined above."

ARGUMENT

1. In the court below, petitioner argued (1) that there was a fatal variance between the allegations in the indictment and the proof at the trial regarding Counts II, IV and VII, because of differences in the serial numbers of the vehicles, and (2) that the evidence was insufficient to support his conviction on Counts II, V, VI and VII. In disposing of these contentions, the court below held that the variances were not fatal inasmuch as "there was positive proof of identity [of the cars] regardless of and without reference to the serial marks," and that it was not necessary to consider the contention as to insufficiency of the evidence since "invalidation of a particular count is immaterial if the sentence on that count runs concurrently with the sentence on a valid count." 277 F. 2d at 514. The court then said (277 F. 2d at 514), "In this connection it should be borne in mind that the jury, in finding appellant guilty on

Count I, presumptively, viewing the evidence in a light most favorable to the Government, found him guilty of all the overt acts charged. These overt acts pertained to the transportation of the cars described in Counts II, III, IV, V, VI, and VII." Petitioner contends (Pet. 16–18) that the court below employed this "reasoning" in "getting around" his contentions of variance and insufficiency of the evidence. The contention is without foundation.

The sentence on the conspiracy count (Count I) runs concurrently with that on Count III which petitioner did not attack at all. Count III supports the first of the consecutive four-year sentences, so that it is unnecessary to consider the conspiracy count.*

As to Count IV, the only challenge to the evidence on that count is the claim of variance. Count IV charged the petitioner and Frank Triola with having transported or caused the transportation from Kansas City, Missouri, to Denver, Colorado, of a 1957 Chevrolet having a "true" serial number 57K165768 and a fictitious serial number VC57A106781. The proof indicated that the confidential serial number was 57K165786, and that petitioner obtained a Missouri title and, with assistance from Triola, sold the

*Since the jury did find petitioner and Triola guilty on the six substantive counts, it is reasonable to assume that the jury found that these acts, alleged as overt acts in the conspiracy count, had been committed in furtherance of the conspiracy. This probably gave rise to the statement by the court of appeals that conviction of the conspiracy represented a finding of guilty on all the overt acts—the court apparently overlooking the fact that additional overt acts were also alleged.

car under the fictitious number alleged (see Statement, *supra*, p. 5).

The court below met the issue of variance and properly held that there was no fatal variance between the allegations and the proof. The indictment sufficiently identified the car and the transportation to enable petitioner to prepare his defense and to protect him from double jeopardy. Cf. *Johnson* v. *United States*, 195 F. 2d 673, 675 (C.A. 8); *United States* v. *Drexel*, 56 F. 2d 588, 589 (C.A. 2).

2. Petitioner complains (Pet. 18–20) of the use of the conspiracy statute "as an instrument for getting into evidence all kinds of unrelated and confusing evidence of a prejudicial nature." We submit, however, that this case reflects a proper use of the conspiracy charge. The instant scheme could not have been successfully executed without elaborate collaboration between various individuals at differing times and places. The obtaining of legitimate public serial number plates from 1957 Chevrolets, the registration of these plates in Alabama, the actual stealing of 1957 Chevrolets and the substitution of the registered public serial number plates for the original public serial number plates on the stolen cars, the application for and acquisition of state automobile titles on the basis of the Alabama registrations, and the interstate transportation and sale of the stolen cars required the coordinated efforts of many. The fact that the proof was somewhat complicated arises from the elaborateness of the scheme which petitioner and the other defendants joined.

3. At the trial, which lasted three days, forty-nine witnesses testified for the government, and 72 exhibits were introduced into evidence. F.B.I. Agent Alvey, who sat at the table with government counsel throughout the trial (Tr. 3, 381), made six summaries covering the evidence introduced regarding each stolen Chevrolet (Tr. 381–390). Each summary listed the model of the car, the "confidential" serial number, the altered "public" serial number, when and where the car was stolen, when and where the car was recovered, and when and where the car was registered and titled under the altered "public" serial number (Gov. Exs. 63–68; Pet. App. 18–23). Agent Alvey testified that the summaries represented a synopsis of his notes of the evidence at the trial which he "checked" against his F.B.I. report (Tr. 281–282). Petitioner argues that four of the six summaries contain matters which were not testified to at the trial and that a fifth summary involved a "selective conclusion" on the part of Agent Alvey as to evidence adduced at the trial (Pet. 6–8). The contention is insubstantial.

Petitioner does not challenge Government Exhibit Number 63, (the summary relating to Count II), nor does he challenge any of the statements in the remaining summaries with respect to the model of the car, the "confidential" serial number, the altered "public" serial number, where the car was stolen, where the car was recovered, and the title history of the car following its registration under the altered "public" serial number in Alabama. Rather, petitioner challenges the evidentiary basis of statements in certain of the exhibits, as to when the cars were stolen and re-

covered.[9] Since the gravamen of the charges against petitioner was his having transported (or having caused the transportation) in interstate commerce of motor vehicles known by him to have been stolen, the precise dates of theft and recovery are not important. Moreover, petitioner was not prejudiced by the dates shown in the questioned exhibits, since, at the least, they closely approximated the evidence at the trial. The exhibits in question, supported by the evidence in every material particular, were properly introduced as an aid to the jury which might be used in correlating a mass of complicated testimony and exhibits. Cf. *United States* v. *Johnson*, 319 U.S. 503, 519; *United States* v. *Schenck*, 126 F. 2d 702, 709 (C.A. 2),

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[9] Thus, petitioner states that the evidence indicated that the "last check" of the car involved in Count III was on July 29, 1957, whereas Government Exhibit 64 states that that car was taken from a certain company "between August 6 and 14, 1957" (Pet. 7); that the evidence indicated that the car involved in Count IV was reported missing on September 9, 1957, whereas Government Exhibit 65 states that the car was taken from a certain company between "August 8 and 13, 1957" (Pet. 7); that there was no evidence adduced as to when the car involved in Count IV was recovered, whereas Government Exhibit 65 states that it was recovered on "January 29, 1958" (Pet. 7); that there was no evidence introduced at the trial to support the statement in Government Exhibit 66 that the car involved in Count V was taken "between September 12, 1957, and October 15, 1957" (Pet. 7); that no evidence was introduced to support the dates when the car involved in Count VI was stolen or recovered (Pet. 8); and that the "confidential" serial number of the car involved in Count VII as stated by Government Exhibit 67 was a "selective conclusion" of Agent Alvey "since there was conflict in the evidence as to the serial number on the vehicle" (Pet. 6–7).

certiorari denied *sub nom. Moskowitz* v. *United States*, 316 U.S. 705; *Graves* v. *United States*, 191 F. 2d 579 (C.A. 10).

CONCLUSION

For the reasons set forth, we respectfully submit that the petition for a writ of certiorari should be denied.

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